IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT WHEELING

V. TAD GREENE, ON BEHALF OF HIMSELF AND AS PERSONAL REPRESENTATIVE OF C.G. GREENE AND ASHLEY L. GREENE,

Plaintiffs,

vs CASE NO. 5:10-CV-104

NATIONWIDE MUTUAL INSURANCE COMPANY, AN OHIO CORPORATION,

Defendant.

**PLAINTIFFS' SECOND MOTION TO REMAND**

Come now the plaintiffs, by their counsel, Scott S. Blass and Bordas & Bordas, PLLC, pursuant to 28 USC §1446, and move to remand this case to the Circuit Court of Wetzel County, West Virginia upon the following ground, to-wit: that the defendant, Nationwide Mutual Insurance Company (Nationwide), has failed to prove that the amount in controversy exceeds $75,000.

The plaintiffs file the following memorandum in support of their motion.

**MEMORANDUM**

This is Nationwide's second attempt to remove the plaintiffs' case. As before, grounds supporting federal jurisdiction do not exist. Accordingly, the case should be remanded to Wetzel County, West Virginia--the venue where it was first brought by the plaintiffs nearly a year ago.

The plaintiffs here are Ashley Greene, her husband, Tad, and their minor daughter. Ashley was injured in a car wreck on Route 2 near Proctor, West Virginia. The plaintiffs received $25,000 from the tortfeasor's insurer, Dairyland, representing the full liability policy limit. The plaintiffs now seek to recover underinsured motorist benefits from their own insurer, Nationwide.

The plaintiffs brought this case in Wetzel County Circuit Court in November, 2009. Nationwide removed it, alleging that the claim had a value in excess of $75,000 and, thus, met the minimum requirements for federal diversity jurisdiction. However, Nationwide's allegations were not supported by any proof. Instead, Nationwide simply pointed to the nature of Ashley's injuries and medical treatment. This court granted the plaintiffs' motion to remand, finding that Nationwide had not met its burden of proof. 3/10/10 ORDER, AT 5. ("[t]he defendant has offered no competent proof or tangible evidence that the amount in controversy exceeds, or it is even highly conceivable that it will exceed, $75,000.")

Following remand, the case proceeded through discovery. On September 15, 2010, Nationwide served a $100,000 offer of judgment pursuant to Rule 68. The offer expired 10 days later. Then on October 7th, Nationwide filed a second notice of removal. Nationwide alleges in its removal papers that "plaintiffs' refusal to accept Nationwide's offer of judgment constitutes other paper" justifying removal. SECOND NOTICE OF REMOVAL, AT PARA. 8.

Nationwide's argument in support of federal jurisdiction must be rejected for two reasons. First, an offer of judgment is not "other paper" for removal purposes.

Accordingly, it cannot be used as proof in support of removal. Second, the text of Rule 68 specifically provides that evidence of an offer made thereunder "is not admissible except in a proceeding to determine costs."

AN OFFER OF JUDGMENT UNDER RULE 68 IS NOT "OTHER PAPER" UNDER §1446(b) AND, AS SUCH, CANNOT BE CONSIDERED AS PROOF IN SUPPORT OF FEDERAL JURISDICTION

The requirements for removal are set forth in §1446(b).

The first half of §1446(b) provides the general rule--i.e., that removal must be perfected within 30 days after receipt of a pleading demonstrating on its face that federal jurisdiction exists.

If the initial pleading does not provide grounds for removal, the second half of §1446(b) applies:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order *or other paper from which it may first ascertained that the case is one which is or has become removable,* except that a case may not be removed on the basis of jurisdiction conferred by §1332 of this title more than 1 year after commencement of the action. (emphasis added)

The question here is whether serving an offer of judgment under Rule 68, and having it expire 10 days later, constitutes "other paper" which would support removal under the second half of §1446(b).

The simple answer is no.

The Fourth Circuit has interpreted §1446(b) far more narrowly than Nationwide suggests. Whenever the removing party is relying on "other paper" to support removal, an objective test is applied. That is, the facts supporting removal must be "apparent within the four corners of the...paper":

> We will not require courts to inquire into the subjective knowledge of the defendant, an inquiry that would degenerate into a mini-trial regarding who knew what and when. Rather, we will allow the court to rely on the face of the initial pleading and on the documents exchanged in the case by the parties to determine when the defendant had knowledge of grounds for removal, *requiring that those grounds be apparent within the four corners of the initial pleading or subsequent paper." Lovern vs. General Motors Corp.,* 121 F.3d 160, 162 (4th Cir. 1997)(emphasis added).

Furthermore, it has long been the law in the Fourth Circuit that removal under the second half of §1446(b) is only proper *where it results from a voluntary act by the plaintiff*. See, e.g., *King vs. Kayak Mfg. Corp.,* 688 F.Supp. 227, 229 (N.D. W.Va. 1988)("only a voluntary act on the part of the plaintiff can render an initially unremovable action removable under the second paragraph of 28 USC §1446(b)"); *Rodgers vs. Northwestern Mut. Life Ins. Co.,* 952 F.Supp. 325 (W.D. Va. 1997)(noting that "other paper" for purposes of §1446(b) must "be the product of a voluntary act on the part of the plaintiff"); *Potter vs. Carvel Stores of New York, Inc.,* 203 F.Supp. 462, 467 (D.Md. 1962)("[t]he authorities are uniform that the 'amended pleading, motion, order or other paper' must emanate either from the voluntary act of the plaintiff in the state court, or other acts or events not the product of the removing defendant's activity").

It is clear, then, from the cited cases, that where removal is sought under the "other paper" language of §1446(b) the paper in question must be *created by the plaintiff and not by the removing party*. See, e.g., *Bowyer vs. Countrywide Home Loans Servicing LP,* 2009 WL 2599307 (S.D. W.Va. 8/21/09)(recognizing a call log as "other paper" because it was "generated by plaintiff through the course of discovery and received by defendant").

Nationwide cites *Yarnuvic vs. Brink's, Inc.,* 102 F.3d 753 (4th Cir. 1996), arguing for a broader rule. Nationwide, in fact, appears to be advocating a rule where anything it receives from any source may be considered. But nothing in *Yarnuvic* conflicts with the cited cases. The "other paper" in *Yarnuvic* was a legal memorandum prepared by the plaintiff--so, clearly, it was a voluntary act of the plaintiff. *Yarnuvic* simply confirms the longstanding rule in the Fourth Circuit.

It does not appear that there are any cases from courts sitting in the Fourth Circuit which deal specifically with an offer of judgment. However, the case of *Humphries vs. Anderson Trucking Service, Inc.,* 2010 WL 2898317 (S.D. Ala. 6/29/10) is directly on point. *Humphries* applies the same principles recognized by the Fourth Circuit, and, in the end, concludes that an offer of judgment may not be used to satisfy the "other paper" requirement.

*Humphries* was a personal injury case. The plaintiff's complaint did not contain a prayer for any specific monetary sum. The parties proceeded with discovery. Eventually, the defendant served an offer of judgment in the amount of $78,500. The plaintiff did nothing and, so, pursuant to rule, the offer automatically expired. The defendant then filed a removal petition citing the plaintiff's failure to accept the offer as proof of federal jurisdiction.

*Humphries* refused to consider the offer of judgment as proof under §1446(b), holding:

> The traditional rule is that only a voluntary act by the plaintiff may convert a non-removable case into a removable one. See *Insinga v. LaBella,* 845 F.2d 249, 252 (11th Cir. 1988)(explaining the judicially created "voluntary-involuntary" rule that applies in diversity cases); see also *Weems v. Louis Dreyfus Corp.,* 380 F.2d 545, 547 (5th Cir. 1967); Thus, a defendant cannot show that a previously non-removable case "has become removable" as a result of a document created by the defendant. See 28 U.S.C. §1446(b)(second paragraph). *Pretka,* 2010 WL 2278358 at 14. The offer of Judgment relied upon by the defendants in the instant case was created by the defendants and not the plaintiff. Accordingly, the failure of plaintiff to respond to the Offer of Judgment, and as a result, its expiration by operation by law, does not make this case removable.

The same logic applies here.

First of all, under *Lovern,* the court may only consider the facts contained within the four corners of writings which are part of the record. Here we have an offer of judgment--nothing more. Nationwide alleges that the plaintiff "refus[ed] to accept" its offer but, of course, this is not a writing. Accordingly, it cannot be considered by the court as part of its removal analysis.

Second, as *Humphries* observed, "there clearly may be a number of reasons why a plaintiff might allow the 10 day period for accepting an offer of judgment to lapse." To assume that the plaintiffs here did so solely because of issues surrounding the value of the claim is rank speculation.

Third, and most importantly, the offer of judgment here was not a voluntary act of the plaintiff. It was indisputably an act of Nationwide--conceived, drafted and served by Nationwide alone.

Nationwide tries to avoid this by suggesting that the plaintiffs' "refus[al] to accept" the offer was itself a voluntary act. But this is misreading of Rule 68. If an offer of judgment is not accepted within 10 days, it is "withdrawn." Addressing this same issue, *Humphries* noted that "[w]ithdrawal of an offer is entirely different from the 'refusal' with which defendant seeks to bind the plaintiff."

Nationwide made an offer of judgment which lapsed after 10 days. The fact that the plaintiffs did not respond to this offer had no legal effect whatsoever. For removal purposes, then, it had no evidentiary value whatsoever. The plaintiffs, in short, did absolutely nothing which could be construed as a voluntary act consenting to federal jurisdiction.

For all of these reasons, the court must disregard any and all evidence relating to Nationwide's offer of judgment. Under Fourth Circuit law, it cannot serve as "other paper" under §1446(b). Because the offer of judgment is the only proof offered by Nationwide in support of its removal, federal jurisdiction is lacking. Therefore, the plaintiffs' motion to remand must be granted.

## UNDER THE EXPRESS LANGUAGE OF RULE 68, EVIDENCE OF AN OFFER OF JUDGMENT IS INADMISSIBLE

In addition to the arguments raised under part "A," there is yet another reason why this court must grant the relief prayed for by the plaintiffs—i.e., Rule 68(c) explicitly says that proof of an offer of judgment is inadmissible in any court proceedings:

> An offer under subdivision (a) or (b) above not accepted in full satisfaction shall be deemed withdrawn, i.e., shall not be disclosed to the jury, *and evidence thereof is not admissible* except in a proceeding to determine costs. (emphasis added)

Clearly, Rule 68 was intended to be a settlement tool. In other words, it was included in the rules specifically as a way to facilitate settlements. It was never intended to be manipulated for the benefit of one party or the other. Thus, the draftsman wisely included language prohibiting an offer of judgment from being used as substantive proof.

Here, however, Nationwide is doing precisely that. Nationwide served its offer of judgment with an ulterior motive. It was simply trying to *create* facts it could then cite in support of removal. To repeat: Nationwide's offer of judgment is the sole proof cited in its removal papers. This court must not embrace any kind of gamesplaying or manipulation in an effort to manufacture federal jurisdiction where it does not otherwise exist. Accordingly, this court must follow the clear mandate of Rule 68 and treat Nationwide's offer as inadmissible.

## CONCLUSION

Nationwide's offer of judgment is not "other paper" as defined by §1446(b). Therefore, it cannot be considered by the court as proof in support of federal diversity jurisdiction. Furthermore, the very language of Rule 68 provides that an offer of judgment is inadmissible. For either or both of these reasons, Nationwide has once again failed to meet its burden of proving that federal jurisdiction exists. Therefore, the plaintiffs' motion should be GRANTED and the case should be REMANDED to Wetzel County Circuit Court.

V. TAD GREENE, ON BEHALF OF HIMSELF AND
AS PERSONAL REPRESENTATIVE OF C.G.
GREENE AND ASHLEY L. GREENE, PLAINTIFFS,

BY: /s/ Scott S. Blass, Esquire_____________

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CERTIFICATE OF SERVICE

Service of the foregoing ***PLAINTIFFS' SECOND MOTION TO REMAND*** was had upon the defendant herein on the 29th day of October, 2010, by filing electronically with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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